Appeal number: SA02/2023A

Original Case No. F0QZ24W7

IN THE COUNTY COURT AT SWANSEA

Swansea Civil Justice Centre
Caravella House
Quay West
Quay Parade
Swansea
SA1 1SP

BEFORE:

HIS HONOUR JUDGE BEARD
ON 11 September 2023

BETWEEN

Mr Paul Evans **Appellant**

- and –

(1) Mr Gareth Morgan

(2) Mrs Cristina Anna Morgan

(3) Belvoir Lettings (T/A Hilary Davies Lettings Ltd)

(4) Acuity law Ltd

Respondents

Representation

The Appellant in person

Mr Govinder Chambay (Counsel) on behalf of the Fourth Respondent

---

JUDGMENT

PRELIMINARIES

1. This is an appeal from the Decision of Deputy District Judge Jowett on 12 January 2023 recorded in an Order of 19 January 2023. For the purposes of this appeal the Fourth Respondent (which shall be referred to as the Respondent from hereon) was joined as a party as the appeal relates solely

to the Judge ordering that the solicitors in question should cease to act on behalf of the Appellant in the proceedings in the case below. The First, Second and Third respondents have not taken part in this appeal. Permission was granted by me on the basis that the Appellant's contention that the decision should not have been made because there were breaches of the CPR requirements was reasonably arguable. The Respondent resists the appeal contending that the decision of DDJ Jowett was correct. The Respondent argues that although there is, ostensibly, a discretionary power to make such an order, in reality this is an administrative mechanism for the court to recognise that a solicitor's retainer has ceased.

2. There are three grounds of appeal:
   2.1. Ground 1: complains that there was a failure to comply with CPR 42.3(2)(a) based on a failure to give notice of the application for an order.
   2.2. Ground 2: complains that there was a failure to comply with CPR PD 23 para 4.1 that, in the absence of relevant circumstances, there should be 3 clear days notice of an application prior to a hearing.
   2.3. Ground 3: complains that DDJ Jowett failed to adjourn the application when the Appellant was raising significant issues of factual dispute, was a litigant in person and wanted to obtain legal advice and as such failed to give the Appellant a fair hearing.

THE DECISION OF DDJ JOWETT

3. The substantive case below was in respect of costs proceedings, however the issue on this appeal is related to the Appellant's solicitor successfully applying to come off record as the representative in the substantive proceedings. Those solicitors had made an unsuccessful application to adjourn a Provisional Assessment Hearing, made by the solicitors and decided by the court on 9 January 2023. The substantive hearing was listed for the morning of 12 January 2023. On 11 January 2023 the Respondent sought the order to come off record. The Appellant became aware of this application when the Respondent sent him an email on the same day just before 7:00 pm.

4. It is important to recognise that there is no transcript of judgment in this case. The only evidence before the Judge was contained in the witness statement of Mr Roffe of the Respondent which supported the application to come off record. The Appellant contested this before the Judge but had not, given the time available, provided any witness statement. The Appellant contends that before the court he objected to the Application arguing that he was not able to properly respond and wished to obtain legal advice. He contended that there were a number of factual challenges he wished to make to the evidence of Mr Roffe. The Appellant contested the Respondent's right to terminate the retainer. I do not intend to go into any detail as to the basis of the appellant's contention; it is unnecessary for the purposes of this judgment. The only judicial record is the Order made which provided:

> *(1) Acuity Law Limited shall cease to be the solicitors for the Claimant.*
> *(2) A copy of this order shall be served by Acuity Law Limited on the Claimant and the Defendants*

Going on to indicate that the court had provided a sealed copy to the Respondent.

SUBMISSIONS

5. Mr Evans argued that at the heart of this appeal is that the Respondent "*dropped* -- (him) *straight in the lurch ----- a lamb to the slaughter*". He argues that his case is that the Respondent was in breach of contract in terminating the retainer. CPR 42 provides for circumstances where there is a change of or end of representation. Mr Evans argued that the effect of Rule 42.3 is to deal with circumstances where there has been no change of representation notice but where the solicitor's retainer has been determined. In those circumstances a solicitor applies for an order under CPR 42.3 declaring that they have ceased to act. Mr Evans makes the point that the notes to the rule in the white book indicate that a solicitor may withdraw for good cause, but go on to state that if not for good cause the court may refuse to make the order. He contends that the Respondent did not have good cause within the meaning of the rule, and should not have been permitted to withdraw. At the very least, he contends, he should have been permitted to challenge the application in an effective way. That would have required an adjournment given two things (a) the absence of formal notice and indeed the short notice he had of the hearing and (b) that as a litigant in person it was unfair to expect him to deal with matters without obtaining legal advice. He argued that the only evidence before the Judge was the Roffe statement, this did not attach any documentary evidence that would have supported a contention that the retainer had been ended for good cause. His further contention was that he should have been given the opportunity to present his own witness statement in contradiction of that provided by the Respondent; thus, he did not have a fair hearing.

6. Mr Evans argued that there was no notice given in this case. The requirements of rule 23, which apply to notice under rule 42.3, were not followed. The Appellant was not served with a copy of the application and supporting evidence three days before the hearing. In those circumstances CPR 23 had not been complied with. He argued that the circumstances did not require an abridgment of time for service. Further on this point he contended that the Respondent should have attended court that day.

7. Mr Evans also argued that the Order was not effective until service under the terms of CPR 42.3. I am afraid that I had some difficulty understanding this argument. The rule requires an Order to be made and then it is to be served. I was referred to ***Charly Acquisitions Ltd. & Anr. -v- Immediate Records & Anr.*** [2002] EWCA Civ 1865 as authority for the proposition that until service the order takes no effect. Mr Evans contended that the construction of the rule and the use of the phrase "*has ceased to act*" in conjunction with the wording of the application seeking an order that the Respondent solicitors "*have ceased*" created a conflict of meaning between the latter as a possible action and a completed action implied by the former. His submission was that the way in which the two words are conjugated with other verbs affects the meaning. As far as I understand the argument his contention is that there was no completed and effective order until a certificate of service was provided sometime in February 2023. On that basis, at the time of the decision by DDJ Jowett, the application did not imply a completed action and the law did not allow for one.

8. Mr Evans also raised an argument which was not foreshadowed in the grounds of appeal, that there were special circumstances which meant that the order should not be made. This is not a phrase to be found in rule but appears in an authority referred to by Mr Chambay dealt with below. It appears the argument is raised to rely on background issues such as the filing of an application to adjourn two days before the application to come off the record. It appeared to me that this, if relevant, is simply a reinforcement of the fair trial argument which I turn to next.

9. The argument in respect of a fair hearing is straightforward. The Appellant was faced with an application at short notice. There was evidence before the court in the form of a statement from Mr Roffe. He disputed that evidence. He was not able to produce a witness statement in response for two reasons; first lack of time, second that he needed to take legal advice. His argument is that in those circumstances there should have been an adjournment.

10. Mr Chambay, on behalf of the respondent began (and indeed ended) his submissions with the suggestion that rule 42.3 is, in effect, an administrative step by the court which reflects a specific reality; that a solicitor's retainer has terminated. He contended that whether this termination was in breach of contract, as argued by the Appellant, was not a matter for a hearing dealing with an application for such an order. His contention was that an argument as to whether a retainer was lawfully terminated required a separate trial and should not be dealt with as ancillary to the existing proceedings. In support of this contention Mr Chambay asked me to consider an extract from *Blackstone's Civil Practice (2022*) and its reference to ***Plenty v Gladwin*** (1986) 67 ALR 26, an Australian High Court authority. The substance of the extract is that applications to come off the record are not required to deal with whether or not the solicitor was right to withdraw, but ensures the court's record reflects the reality that the solicitor no longer acts for a client.

11. Mr Chambay accepted that applications under rule 42.3 should be made following CPR 23. However, he pointed out that rule 23 also provides for exceptions to serving notice and so the rule is not absolute. He referred to Practice Direction 23 which refers to informal notice being given. He contended that the email to the Appellant of the 11 January 2023 to the Appellant amounted to such informal notice. He makes the point that DDJ Jowett's order contains no indications as to findings, but is to be implied that he had abridged time for the notice or alternatively dispensed with the requirement for formal notice when making the order. It is argued that the Judge was entitled to do so on the basis that the Appellant had informal notice and the court is engaged in a solely administrative decision.

12. In respect of the failure to grant an adjournment, Mr Chambay argued that this is simply a case management decision. He contended that this must be approached with the higher benchmark applied to such decisions that discretion was "clearly wholly wrongly exercised" (see ***Jalla v Shell*** [2021] EWCA Civ 1559). Mr Chambay stated that this could not be maintained because the decision to make the order was inevitable. Even if the Appellant had obtained legal advice during an adjournment this would have made no difference to the outcome.

THE LAW

13. CPR 42 provides the processes by which a change of representation is reflected in the court record. However, CPR 42.1 sets out that where the solicitor's address is the address for service the solicitor is considered to be acting for a party until the provisions of one of the remaining aspects of the rule are complied with. The rule distinguishes between a change of solicitor by the party represented by the solicitor, which requires no action by the court, and the other methods where a solicitor ceases to act, which require a court order. The relevant part of the rule in this case is 42.3 which provides:

> *(1) A solicitor may apply for an order declaring that he has ceased to be the solicitor acting for a party.*
> *(2) Where an application is made under this rule—*
> *(a) notice of the application must be given to the party for whom the solicitor is acting, unless the court directs otherwise; and*
> *(b) the application must be supported by evidence.*
> *(3) Where the court makes an order that a solicitor has ceased to act—*
> *(a) a copy of the order must be served on every party to the proceedings; and*
> *(b) if it is served by a party or the solicitor, the party or the solicitor (as the case may be) must file a certificate of service.*

The notes to CPR 42.3 in the White Book indicate that where the solicitor's retainer has been determined and r.42.2 is inapposite, the solicitor can apply for an order under r.42.3 and the solicitor should do so promptly. The notes also indicate the solicitor is entitled to withdraw for good cause, setting out a number of potentially good reasons. What is clear is that notice needs to be served on the client and the practice direction makes it clear that this is a notice which should be compliant with the process set out in CPR 23. A solicitor is not required to attend and can provide a written application where there is a simple case but where a solicitor wished to withdraw from a complex case it was advisable to attend in person (see ***Miller v Allied Sainif (UK) Ltd*** [2000] 10 WLUK 690)

14. CPR 23.7 sets out the timescales for service of an application and requires that a notice which is not subject to a specific time limit in the rules must be served at least 3 days before the court is to deal with the application. However, CPR 23.7(4) provides:

> *If—*
> *(a) an application notice is served; but*
> *(b) the period of notice is shorter than the period required by these Rules or a practice direction,*
> *the court may direct that, in the circumstances of the case, sufficient notice has been given, and hear the application.*

This means that the court still has power to hear an application that has not been served in compliance with the 3-day rule. The practice direction to rule 23 indicates that where there is insufficient time to serve the notice informal notification of the application should be given.

15. The Appellant has referred me to 14 authorities upon which he relies, I deal with some directly below and have considered them all. Many, in my judgment, do no more than set out some general principles which need to be applied in any case, as Mr Chambay put it "that the rules must be followed" e.g the cases that deal with the requirements of notice under CPR 23. I do not criticise the Appellant for this, as a litigant in person he has thoroughly prepared and has provided supporting authorities for a number of propositions. As an example, he has relied on authorities which relate to the Australian Courts decisions and frankly told me that he included those because of the reference to an Australian case by the Respondent (that being the case referred to by the Editors of Blackstone Civil Practice).

16. In the case of ***Wilson & Ors. -v- Bayer Pharma AG & Ors***. [2022] EWHC 670 Turner J points out the importance of professional privilege in dealing with these types of applications. His method of dealing with those issues was to hear the matter in private and in the absence of the Defendants. Turner J also makes the point that the rule gives no guidance on the principles to be applied in considering an application under rule 42.3. and then the Judge states:

> *"A solicitor may terminate his or her retainer on a number of grounds. In order to preserve privilege, I will not identify the grounds relied upon for the purposes of these applications. Indeed, it is quite unnecessary for me to do so. It is simply not open to this Court to adjudicate on the merits of those grounds. Many individual claimants expressed acute and well-articulated disappointment; perceiving that they had been positively encouraged to join in the litigation by PGMBM only to be let down and abandoned at a late stage. PGMBM, on the other hand, contended that they have behaved with propriety throughout. The bottom line, however, is that a court cannot normally (if at all) require a solicitor to continue to act for a party whose retainer he or she has terminated. In circumstances in which the termination of the retainer is unjustified then the individual claimant may seek a seek a remedy in damages, indemnity or costs against the solicitor. I repeat that I make no relevant finding on that issue."*

Turner J considered that he was not required to adjudicate as to which circumstances a court may decline to make an order where there is an unequivocal termination of retainer.

17. The cases of ***Underwood, Son & Piper -v- Lewis*** [1894] QBD 306, ***Gill -v- Heer Manak Solicitors*** [2018] EWHC 2881 and ***Vlamaki -v- Sookias & Sookias*** [2015] EWHC 3334 (each of which deal with decisions on claims brought by or against firms of solicitors and whether a firm was entitled to terminate a retainer). Those decisions would only be relevant to the question which I am required to answer if DDJ Jowett was required to adjudicate upon the merits of termination. Based on the reasoning in ***Wilson*** I do not consider that they are relevant.

18. I have also been referred to ***Charly Acquisitions Limited & Anr. -v- Immediate Records INC & Ors*** [2002] EWCA which deals with an interlocutory hearing in the Court of Appeal. The case makes reference to CPR 42.3 and refers to an Order not taking effect until all the requirements of the rule are complied with. However, it is notable that the court in ***Charly*** is adjudicating as to the "effect" of the order as to where service of documents should be effected. The case is not considering the "effect" of the order insofar as the court recognising the termination of a retainer. In ***Mathews v Mathews & Anr***. [2018] EWHC 906 before Holman J there was a failure to serve notice under CPR 42.3, however whilst the case indicates that the rule provides an important safeguard in terms of notice, it does not state that there was no termination of the retainer. Instead, the case concentrates on the need for an adjournment because a party was suddenly and without notice unrepresented.

19. The Appellant also referred me to a court of appeal case ***Frey*** however it is an unapproved judgment and does not have the requisite permissions for use in court. However, that said, the proposition which Mr Evans advances in referring to the case is so fundamental it requires no authority. A party is entitled to have the opportunity to be heard in proceedings, and in the absence of the opportunity there is no fair hearing.

20. The Respondent referred me to ***Jalla & Anr. -v- Shell*** [2021] EWCA Civ 1559 the essence of which I have set out in the Respondent's argument above. The Respondent also referred me to ***Bowden v Homerton University Hospital*** [2012] EWCA 245 which indicates that a discretionary case management decision can only be successfully appealed if the Judge has failed to take account of relevant matters or taken account of irrelevant matters. However, it goes on to state, in particular, that the examination of the balance of prejudice is an important consideration in such cases. Mr Chambay also points to this case demonstrating that an application to adjourn is a case management decision.

21. In ***Bowden*** Lloyd LJ, with whom Ward LJ agreed makes an important point of relevance here. At paragraph 16, Lloyd LJ addresses one of the reasons the first instance judge gave for refusing to grant an adjournment. The claimant in the case had agreed to his solicitors coming off the record shortly before the trial. Lloyd LJ sets out dealing with Judge using this as a reason to deny an adjournment:

> *One of the two particular points is that he does seem to have relied on the claimant having agreed to the solicitors coming off the record. That implies that the claimant could usefully have declined to agree. It does not seem to me that if he had taken that position it would have achieved anything other than possibly some delay in resolving the position of the solicitors.*

22. It appears to me taking account of these authorities the following propositions can be seen. First, an application under 42.3 should be made, generally, in the absence of the other party to the substantive proceedings, because of the issues of privilege that might arise. Second, such an application should be made on notice; that notice being an important procedural protection for the

client. Third, there is a discretion whether to grant an order, but no guidance exists as to when the order should be refused. Fourth, that if there is a substantial dispute about whether the solicitor has good cause to terminate a retainer it is not a matter to be considered at the application hearing. Fifth, that it may be appropriate to adjourn substantive proceedings where a party becomes suddenly unrepresented, but that is a discretionary exercise. Sixth, that the purpose of solicitors remaining on the record when the proper steps were not taken after the order had been granted is to facilitate the effectiveness of other rules when the case is being managed.

CONCLUSIONS

23. I am considering what might be viewed as an unusual order of the court. Most orders can be divided into two categories, those which are truly interlocutory, amounting to case management decisions, and those which are final orders either to a case as a whole or an issue within the case. On the basis of the law as I have set it out above this type of Order may be considered *sui generis* an order entirely of its own type. In terms, the making order is essential to the smooth running of case management within proceedings as it relates to the ways in which parties interact with each other and the court. As an example, it allows for clarity with the formalities of such things as service of documents (see ***Charly*** above). However, that aside as can be seen from the decisions in ***Wilson*** and ***Bowden*** the order can not be used to prevent the termination of the solicitor/client contract. That is unsurprising, if the rule 42.3 did permit that, it would be providing a form of injunctive relief without the usual safeguards. That there is a discretion not to make the Order must have some purpose, however. In my judgment, that purpose must be to allow for the clarity as to the application of CPR rules, such as those on service. This is, as Mr Chambay argued, an administrative rule.

24. This conclusion is reinforced because, as the case law indicates, an application hearing is not suitable for the solution of substantive disputes about breach of contract, that must be the purview of separate proceedings. However, that conclusion raises a specific question as to the status of the adjudication made for future proceedings. It is usually the case that issues of *res judicata* would apply where the court has made a decision based on evidence. This rule requires the provision of evidence in for the Order to be made. ***Johnson v Gore Wood*** [2002] 2 AC is the leading case dealing with this type of issue where it was indicated that where an issue was adjudicated upon previously the court should ask whether in all the circumstances a party's conduct is an abuse of process applying a broad merits-based judgment taking account of public and private interests and all the facts of the case. The case states that attention should be focused on the question, whether, in all the circumstances a party is misusing or abusing the process of the court. It appears to me unlikely that in circumstances where the Judge in a rule 42.3 hearing is, simply assessing whether the reason asserted by a solicitor applicant falls into the category of a “good reason” without testing the truth of that assertion that the question of *res judicata* would arise. This means that there has been no conclusion either way on the issue of whether there is a breach of contract, which would have to be decided in separate proceedings if raised.

25. The Judge adjourned the substantive proceedings. That was entirely the correct course in the circumstances. However, the Judge also made other orders in those substantive proceedings which negatively impacted on the Appellant, this was in circumstances where the Appellant was suddenly unrepresented. That order is not subject of this appeal; however, it does inform one aspect of the appeal, that is the impact of permitting the order which left the Appellant unrepresented. It appears to me that in the circumstances of this case, where the Appellant objected to the order being made, where the application was made late and where the claimant wished to seek legal advice the decision as to whether to make the order should have been adjourned.

26. However, time has moved on and given my conclusions that, in effect, the order should not have been made when it was, nonetheless the order needed to be made and would have been made shortly after, even if the application had been adjourned. In those circumstances allowing this appeal would simply add to the costs by requiring a further hearing and would make no difference to the outcome. Therefore, despite my conclusion on the need for an adjournment set out above I would dismiss this appeal.